

and the only way it can do so is by engaging in a facilities segregation approach. This is a resurrection of the “two-call” theory this Commission rejected in favor of the “end-to-end” analysis. When there is an interstate communication, all parts of that communication, and all of the services provided by all of the carriers to route and transmit that communication, are interstate. This must be the case. For example, when an ILEC end user calls an ISP served by a CLEC, all of the facilities between the end user, the ILEC, the CLEC and the ISP are very likely to be within the same local calling area. The end user, the ISP and all the carriers are in the same state.¹¹¹ Yet the FCC very clearly held in the *ISP Remand Order* that the ILEC and competitive carrier’s jointly provided service between the end user and the Internet is a form of interstate access. This aspect of the FCC’s rulings in the reciprocal compensation wars has never been reversed or even seriously challenged.

ISPs can choose to purchase intrastate service. Alternatively, the ISP can choose to obtain service through an interstate offering.¹¹² It is possible to get a local number as part of an ILEC’s interstate switched access FG A or BSA A tariff.¹¹³ The TPUC Final Order wrongly eliminates the choice given to ISPs to purchase either an interstate service or an intrastate service. ASAP has offered only an interstate service, and the ISPs have chosen to accept that service.¹¹⁴ The TPUC Final Order is inconsistent with the current law concerning the jurisdictional nature of the telecommunications services provided to ISPs and removes the choices made by ASAP’s ISP customers to receive interstate, rather than intrastate, service.

¹¹¹ The TPUC Final Order adopted the PFD finding that the ISP customers in are Texas. TPUC Final Order p. 5, citing PFD at 55.

¹¹² *ISP Remand Order* ¶ 55; *MTS/WATS Market Structure Order*, 97 FCC 2d at 711-12, 722; *Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2, Memorandum Opinion and Order, 4 FCC Rd 1, 141 (1988), *aff’d*, *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993).

¹¹³ ASAP Exh. 43 (Goldstein Reb.) p. 18; ASAP Exh. Exh. 44 (Gaetjen Reb.) p. 11. Calls to an interstate Feature Group A number are **retail rated** as local to the calling party, there is no charge, even if the IXC and the called party are not “physically present” within the local calling area at the time of the call. FG A incorporates expanded calling areas like ELCS. Local numbers are routinely used to support totally interstate services. This is what ASAP does for its ISP customers.

¹¹⁴ Since ASAP is not an ILEC, it is not required to have interstate tariffs.

The FCC's statutory regulatory power over interstate communications "indicates an intent by Congress to occupy the field to the exclusion of state law."¹¹⁵ "Interstate communications are totally entrusted to the FCC...The dividing line between the regulatory jurisdictions of the FCC and states depends on 'the nature of the communications which pass through the facilities [and not on] the physical location of the lines.'"¹¹⁶ "It is beyond dispute that interstate telecommunications service is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC."¹¹⁷ "The states do not have jurisdiction over interstate communications."¹¹⁸ The Commission has preempted state statutes and state regulatory actions that attempted to intrude on the FCC's exclusive interstate authority.¹¹⁹ TPUC Ordering Paragraph No. 4 expressly requires ASAP to register or cease providing service. This is beyond TPUC's power, since it cannot in any way prevent a carrier from providing a purely interstate service until it subjects itself to state regulation.

ASAP agrees that TPUC registration itself is not a particularly onerous thing to accomplish.¹²⁰ The act of registration, however, necessarily subjects the registrant to significant PUC jurisdiction. This includes TPUC's ability to require reporting, statewide averaged prices and certain quality standards.¹²¹ TPUC can specify billing formats,¹²² and require the registrant

¹¹⁵ See *Ivy Broadcasting v. AT&T*, 391 F.2d 486, 490 (2nd Cir. 1968). This exclusive jurisdiction is grounded in the Communications Act, as amended. 47 U.S.C. § 152(a) applies to "all interstate and foreign communication by wire or radio." The savings clause in § 152(b) is no help, because it reserves state jurisdiction only to "intrastate" communications.

¹¹⁶ *NARUC v. FCC*, 746 F.2d 1492, 1498 (DC Cir. 1984) (and cases cited therein).

¹¹⁷ *AT&T Communications v. Wyo. PSC*, 625 F.Supp. 1204, 1208 (USDC Wyo., 1985).

¹¹⁸ *AT&T and the Associated Bell Sys. Cos. Interconnection with Specialized Carriers in Furnishing Interstate Foreign Exchange Service in Common Control Switching Arrangements (CCSA)*, 46 F.C.C.2nd 14, 20 (1975), *aff'd* *California v. FCC*, 567 F.2d 84 (D.C.Cir.1977) *cert. den.* 434 U.S. 1010.

¹¹⁹ *In the Matter of Operator Services Providers of America Petition for Expedited Declaratory Ruling*, FCC 91-185, 6 F.C.C.R. 4475 (Rel. Jul. 1991); Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp.*, 7 F.C.C. Rcd 1619 (1992) ("MemoryCall").

¹²⁰ Order p. 5, n. 9.

¹²¹ See PURA §§ 52.102, 52.256.

to cease doing business in the state under certain circumstances.¹²³ It allows TPUC to resolve some disputes between the carrier and its customers – presumably with an appeal to state court (rather than the FCC or a federal court). Registration may require ASAP to pay regulatory assessments imposed on intrastate nondominant carriers, based on ASAP’s purely interstate service revenue.¹²⁴ ASAP does not at present know whether the revenues from the service it provides to ISPs is subject to the state USF or the federal USF.¹²⁵ Any attempt to require ASAP to pay regulatory assessments to both jurisdictions and USF to both state and federal funds for the same service revenue will be confiscatory and unlawful. TPUC’s assertion of jurisdiction over ASAP’s interstate service exceeds the state’s authority and violates federal law.

III. CONCLUSION

TPUC failed to recognize and apply federal law. As a result, it violated several important federal rights held by CenturyTel’s customers, ASAP and ASAP’s customers. The FCC must now enforce those rights through preemption. These issues are in large part purely legal, but there are some important policy implications as well: where is the harm and where does the public interest lie? Is CenturyTel harmed when it routes calls to ASAP via the meet-point within San Marcos and incurs no different cost than if it were to route to SBC or Verizon? Are the ISPs – which provide service in both rural and metropolitan areas – harmed when they are able to obtain PSTN connectivity for one-fourth of the price that CenturyTel charges and one-half of

¹²² See PURA § 16.001(c); PUC Subst. R. 26.420(f)(5)(A).

¹²³ See PUC Subst. R. 26.107(f)(2). TPUC Final Order itself required ASAP to either register or cease providing service.

¹²⁴ PURA § 16.001 imposes a “regulatory assessment” on “telecommunications carriers” that “serve[] the ultimate consumer.”

¹²⁵ PUC Subst. R. 26.420(f) imposes a “TUSF” (Texas USF) on all “telecommunications providers having access to the customer base; including but not limited to wireline and wireless providers of telecommunications services.” TPUC regulates how providers recover the assessment and require the provider to “file the appropriate changes to its tariff and provide supporting documentation for the method of recovery.” As noted above, ASAP’s services have been mandatorily or permissively detariffed by this Commission. TPUC cannot require ASAP to file tariffs for services this Commission has said ASAP may or must detariff.

what SBC charges?¹²⁶ Are CenturyTel's end users harmed by being able to reach ASAP's ISP customers without paying toll? Where does the public interest lie?

ASAP provides a valuable competitive and public service to both its "customers who carry a pager" and its ISP customers. ASAP directly competes with CenturyTel. Ultimately, that is CenturyTel's (and perhaps TPUC's) problem. But there is no harm to either CenturyTel or any other person as a result of ASAP's service provision. CenturyTel is absolutely cost and revenue indifferent to whether it sends a call to ASAP, SBC or Verizon. There is no damage done, other than to CenturyTel's unreasonable and illegal desire to extract money from its captive ratepayers or any competitor who makes the "mistake" of trying to enter CenturyTel's market.

If the TPUC decision stands, then people will suffer. Competition will suffer. ISPs will have fewer options; their cost of providing service to rural areas like Fentress, Kyle and Lockhart will rise and this increased cost will be passed on to end users. CenturyTel and its affiliated ISP) will rejoice. The doctors and organ transplant waites using ASAP's service – the public that state and federal regulators are supposed to protect will suffer. Why? Because CenturyTel insists it is entitled to toll or access for any call that goes to a customer of a carrier other than CenturyTel, SBC or Verizon. This is not the law and it is not proper policy.

The TPUC Final Order violates federal law in numerous respects. The Commission must step in and preserve end users' rights to dialing parity, ASAP's customer's right to receive local calls and ASAP's federal interconnection and numbering resources rights.

¹²⁶ ASAP Exh. 43 (Goldstein Reb.) p. 20. If you are an ILEC you have no reason to respond to price competition when you can instead use your ability to dissuade your captive base of end users from calling an ISP served by a competitor by imposing a tax on them whenever they call. A customer who wants inbound-only service but who gets no calls will quickly abandon the fledgling competitor. As noted, above, ASAP has not sought *wholesale carrier compensation* from CenturyTel for any calls to any of ASAP's customers under either §§ 251(b)(5) or 201. ASAP receives its revenues from its own customers, not other carriers. ASAP's services do not involve "arbitrage" or uneconomic competition. ASAP is doing exactly what this Commission indicated was the proper way to compete. CenturyTel, however, is not.

WHEREFORE, PREMISES CONSIDERED, ASAP PAGING INC. respectfully requests that the Commission grant this Petition for Preemption and: (1) preempt the October 9, 2003 order of the Public Utility Commission of Texas in TPUC Docket 25673 [Exhibit 1]; (2) preempt certain provisions of the Texas Public Utility Regulatory Act [Exhibit 2]; (3) preempt certain TPUC substantive rules [Exhibit 3]; (4) require the TPUC and CenturyTel of San Marcos, Inc. ("CenturyTel") to honor federal law as it pertains to **retail rated** local calling to CMRS users with numbers that are "local" to the landline user; and (5) preempting TPUC's attempt to require that ASAP submit to state regulation for an exclusively interstate service over which TPUC has no jurisdiction.

Respectfully Submitted,

ASAP PAGING, INC.

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CERTIFICATE OF SERVICE

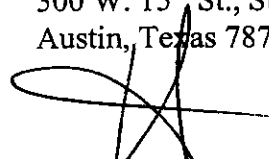
The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record below to the above-styled cause, on this 22nd day of December, 2003.

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ASAP Paging, Inc. Petition for Preemption of TPUC

Exhibit 1: TPUC Final Order



Control Number: 25673



Item Number: 162

Addendum StartPage: 0

**PUC DOCKET NO. 25673
SOAH DOCKET NO. 473-02-2503**

10/07/10 4:10:03
PUBLIC UTILITY COMMISSION
FILING CLERK

**COMPLAINT, REQUEST FOR §
EXPEDITED RULING, REQUEST FOR §
INTERIM RULING, AND REQUEST §
FOR EMERGENCY ACTION OF ASAP §
PAGING, INC. AGAINST CENTURYTEL §
OF SAN MARCOS, INC. §**

**PUBLIC UTILITY COMMISSION
OF TEXAS**

ORDER

I. Introduction

This Order denies the Complaint of ASAP Paging, Inc. against CenturyTel of San Marcos, Inc. ASAP alleged that CenturyTel improperly assessed toll charges on CenturyTel customers who called ASAP's paging service and Internet-service-provider (ISP) customers with certain NPA-NXX assignments. For the reasons discussed in this Order, the Commission finds that: (1) calls from CenturyTel's San Marcos customers to the ASAP Fentress, Kyle and Lockhart numbers in question, as currently assigned, are properly rated as toll; and (2) ASAP must register with the Commission pursuant to Public Utility Regulatory Act (PURA) § 52.103 for its service to ISPs.

Except where inconsistent with this Order, the Commission adopts the Proposal for Decision (PFD) issued by the State Office of Administrative Hearing's (SOAH's) administrative law judge (ALJ), including the findings of fact and conclusions of law. However, as explained below, the Commission declines to adopt the ALJ's reasoning in finding that the calls were rated as toll, and that ASAP must register with the Commission for its services to ISPs. Specifically, the Commission finds that the ALJ improperly applied law and policies regarding the jurisdictional nature of Internet-bound traffic and inter-carrier compensation. The Commission finds that the ALJ should not have applied these laws and policies to resolve the case at hand because they are extraneous to the resolution of the case. The Commission, instead, finds that this Order should be based narrowly on the unique nature of expanded local calling service

(ELCS) in Texas, in particular the location of the calling party (CenturyTel's customer) and called parties (ASAP or ASAP's ISPs), and whether both the calling and called parties are within the ELCS areas.

II. Procedural History

After the PFD was returned from SOAH on April 24, 2003, the Commission requested additional briefing from the parties regarding registration of telecommunications utilities. The Commission issued a briefing order on June 11, 2002, and ASAP, CenturyTel and Commission Staff filed briefs on June 19, 2003. ASAP and CenturyTel filed reply briefs on June 26, 2003, and Commission Staff filed its reply brief on June 27, 2003 after requesting permission for late filing.

To reflect this procedural history, the Commission adds new Finding of Fact No. 11A.

III. Background

ASAP Paging, Inc. is licensed as a commercial mobile radio service (CMRS) provider offering paging services in, among other places, San Marcos, Texas, and ASAP Paging also provides interconnection to the public switched telephone network (PSTN) and transport to ISPs. CenturyTel of San Marcos, Inc. is the incumbent local exchange carrier (ILEC) in San Marcos, and has been issued a certificate of convenience and necessity by the Commission.

ASAP's complaint alleged that CenturyTel improperly charged CenturyTel's customers toll when calling ASAP's 512-384 NXX, which has been associated with the Lockhart exchange.¹ According to ASAP, calls from San Marcos to its Fentress, Kyle and Lockhart NPA-

¹ While the Preliminary Order and ASAP's complaint originally focused solely on the Lockhart 512-384 central office code (NXX), the ALJ expanded the PFD to address ASAP's NPA-NXXs associated with the Lockhart, Kyle and Fentress exchanges.

NXXs should be rated as local calls, because there is an ELCS arrangement between all of these exchanges. CenturyTel argued that the calls to these NPA-NXXs do not qualify for ELCS and should be rated as intraLATA toll calls for two primary reasons: (1) the calls are sent to ASAP's paging switch in Austin, which is not part of the San Marcos ELCS calling area; and (2) the NPA-NXXs are assigned to ISPs. CenturyTel also argued that ASAP is required to register with the Commission as a telecommunications utility.

IV. Discussion

A. Registration with the Commission

The ALJ found that the services ASAP provides to ISPs — landline-based connectivity to the PSTN by providing phone numbers and DS-1 (and greater) trunks — require ASAP to register with the Commission, but do not require ASAP to obtain certification. The Commission concurs with this finding.

The Commission agrees with the ALJ that ASAP is a telecommunications utility pursuant to PURA § 51.002(11)(E),² and that, pursuant to PURA § 52.103, as a telecommunications utility, ASAP must register with the Commission. ASAP itself has stated that it is a common carrier providing a "telecommunications service" when serving ISPs, and that it falls within PURA's definition of telecommunications utility.³ In addition, because ASAP "conveys, transmits, or receives communications wholly or partly over a telephone system,"⁴ ASAP is a nondominant carrier.⁵

² PFD at 34.

³ Rebuttal Testimony of Ted Gaetjen at 13-14. *See also* PFD at 31.

⁴ PFD at 34.

⁵ *See* P.U.C. SUBST. R. 26.5(139).

Furthermore, the Commission concurs with the ALJ's analysis that these services – number assignments and dedicated trunking – are not related or supplemental to ASAP's paging services, and therefore are not "incidental" to ASAP's CMRS license.⁶ In addition, the Commission agrees with the ALJ that ASAP's service to ISPs does not require certification. The service is not basic local telecommunications service as defined in PURA § 51.002(1), local exchange telephone service as defined in PURA § 51.002(5), or switched access as that term is used in PURA § 54.001 (or defined in P.U.C. SUBST. R. 26.5(209)).⁷

However, the ALJ does not address the specific requirement in PURA § 52.103 that telecommunications utilities must register no later than 30 days after the utility commences service to the public. "Commences service to the public" is not explicitly defined in PURA or the Commission's Substantive Rules. In implementing PURA § 52.103, the Commission adopted P.U.C. SUBST. R. 26.107(c), which requires a nondominant carrier to file its registration within 30 days of "commencing service in Texas." In adopting P.U.C. SUBST. R. 26.107(c), the Commission necessarily determined that "commencing service to the public" under PURA § 52.103 is met when a nondominant carrier commences service in Texas.

ASAP is a telecommunications utility and a nondominant carrier that has commenced providing service in Texas. Accordingly, the Commission determines that ASAP must register with the Commission under P.U.C. SUBST. R. 26.107(c).

To reflect the Commission's decisions on this issue, Finding of Fact No. 25 is modified and Conclusion of Law No. 13A is added to state that ASAP provides service to the public. In addition, Conclusion of Law Nos. 14 and 15 are modified to reflect that ASAP is a nondominant carrier.

⁶ PFD at 16-17.

⁷ PFD at 33-34.

B. Jurisdictional Nature of ISP-Bound Traffic

In his discussion regarding whether ASAP must register or obtain a certificate from the Commission, the ALJ focuses at length on the jurisdictional nature of the traffic bound for ASAP's ISPs. *The Commission finds that it is not necessary to reach this issue for the purposes of determining whether certification or registration is required, and therefore declines to adopt this aspect of the PFD.*

The PFD ultimately relies on the definition of telecommunications utility, rendering the other discussions unnecessary. When the ALJ examined the three types of services requiring certification pursuant to PURA § 54.001, PURA's registration requirement in § 52.103, and the definition of "telecommunications utility" in PURA § 51.002(11), the jurisdictional nature of the traffic was not a factor in reaching a decision.⁸ The Commission agrees that the registration requirement requires a simple review of the definitions of telecommunications utility and nondominant carrier, and the application of these definitions to ASAP's specific service to ISPs. The Commission further concurs with the ALJ's finding that the Commission is not precluded from imposing this registration requirement because the services are not incidental to ASAP's federal CMRS license, and the customers served by ASAP reside in Texas.⁹

Accordingly, the Commission declines to adopt the PFD's discussion regarding the jurisdictional nature of ISP-bound traffic, and deletes Conclusions of Law Nos. 7, 8, 9 and 17.

C. Criteria for Rating ELCS Calls

The ALJ concluded that calls from CenturyTel's San Marcos customers to ASAP's NPA-NXXs are not eligible for ELCS and are properly rated as toll calls.¹⁰ For the reasons discussed

⁸ PFD at 16-17, 33-35.

⁹ PFD at 55. Furthermore, the Commission notes that the registration itself presents a minimal burden on ASAP.

¹⁰ PFD at 51.

below, while the Commission agrees with the ALJ's conclusion, the Commission declines to adopt part of the ALJ's reasoning in reaching this conclusion.

ELCS is a special arrangement that expands an ILEC's toll-free calling area to adjacent exchanges in geographic proximity or that have a community of interest.¹¹ The ELCS arrangement provides for mandatory, two-way, toll-free calling service between the geographic areas. For example, because the Commission approved ELCS calling arrangements between San Marcos and Lockhart, telephone calls between the ILEC's customers in San Marcos and Lockhart do not incur long-distance toll as they normally would without ELCS.¹² To compensate ILECs for expenses and lost revenue incurred by this ELCS arrangement, customers in each of the petitioning ELCS areas pay a monthly ELCS fee to the ILECs.

The ALJ found that, in order to be eligible for ELCS treatment, calls must have a "geographic correlation" to the ELCS area, and that the calls in question do not have a geographic correlation to the ELCS exchanges.¹³ The Commission concurs with these findings, and concludes that ELCS was clearly meant to provide toll-free calling to exchanges with geographic proximity or with a community of interest.

The ALJ also concluded that "calls must originate and terminate within the designated ELCS exchanges to qualify for rating as ELCS local," and therefore calls to ASAP's NPA-NXXs are not eligible for ELCS treatment.¹⁴ In finding that calls from San Marcos to ASAP's NPA-NXXs in question were properly rated as toll, the ALJ concluded that both the ISP-bound and pager-bound calls terminate at the ASAP paging switch in Austin. The ALJ reasoned that, because it is not possible to know the location of the pager, the paging terminal could be used as

¹¹ See P.U.C. SUBST. R. 26.219. See also PURA § 55.041-48.

¹² *Petition for Expanded Local Calling Service from the Lockhart Exchange to the Exchange of San Marcos*, Project No. 13267, Order No. 8 (Mar. 9, 1005).

¹³ PFD at 51.

¹⁴ PFD at 54.

a proxy for customer location, and concluded that a similar rationale could apply to the ISP-bound calls.¹⁵ The Commission declines to adopt this part of the PFD.

Instead, the Commission finds that the geographic location of the calling customer and the called customer is the appropriate factor for differentiating toll calls from ELCS calls in this case. The Commission concludes that, for purposes of ELCS, when a CenturyTel customer calls an ASAP ISP the ISP, which is located in Austin, is the called customer. Therefore, calls to these ASAP NPA-NXXs from CenturyTel's customers in San Marcos are outside of the ELCS calling area and may not be rated as ELCS.¹⁶

In the same fashion, the Commission finds that, for purposes of determining whether a paging call is an ELCS or toll call under the specific facts of this case, CenturyTel's customers are calling ASAP's paging service at ASAP's mobile telephone switching office located in Austin. Therefore, calls to these ASAP NPA-NXXs from CenturyTel's customers in San Marcos are outside of the ELCS calling area and may not be rated as ELCS.

The ALJ concluded that CenturyTel may charge intraLATA toll for calls to ASAP's NPA-NXX's in accordance with CenturyTel's tariffs.¹⁷ The Commission concurs that CenturyTel must assess charges on its retail customers in accordance with its tariff. By complying with its tariff, the Commission finds that CenturyTel is following the law and is not acting in an anticompetitive manner.

To reflect the Commission's decisions, Finding of Fact No. 20A is added in support of Conclusion of Law No. 29 to reflect that ASAP is the called customer, and Conclusion of Law Nos. 20, 27 and 28 are deleted. In addition, Finding of Fact No. 51A is added in support of

¹⁵ PFD at 54.

¹⁶ The FCC has also concluded that ISP-bound calls beyond the local exchange could continue to be rated toll. *Intercarrier Compensation for ISP-bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, ¶37 (rel. Apr. 27, 2001). See also *Starpower Communications, LLC, v. FCC*, No. 02-1131, slip op. at 12 (D.C. Cir., July 18, 2003), quoting the Fifth Circuit Court's determination of a Texas PUC case for the proposition that "the called party's premises [] is the ISP's local facility."

¹⁷ PFD at 55, 89.

Conclusion of Law No. 38 to reflect that CenturyTel's actions were not anticompetitive in violation of PURA. Further, Findings of Fact Nos. 3, 32, 35, 39, 42 and 44, Conclusion of Law Nos. 19, 21, 22, 25, 26, 29, 30 and 31, and Ordering Paragraph 3 are revised to reflect that, for ELCS rating purposes ASAP and the ISPs are the called customers, and pursuant to its tariffs, CenturyTel may charge toll for calls from CenturyTel's San Marcos customers who presubscribe to CenturyTel or use the CenturyTel dial-around number to ASAP's NPA-NXXs.

IV. Other Changes to the PFD

The Commission makes the following additional changes to the PFD:

Proposed Finding of Fact No. 8 is revised to correctly reflect the date the Commission's Preliminary Order was issued.

Proposed Finding of Fact Nos. 12, 13, 16, 18, 20, 27 and 37 are modified, and Finding of Fact No. 19 is deleted, in order to more accurately characterize the paging network and the transmission path of the paging calls from satellite to transmitter to pager, and to more clearly describe the transmission path of an ISP call.¹⁸

Conclusion of Law No. 36 is revised to reflect that ILECs, rather than incumbent exchanges, are responsible for completing ELCS calls within the ELCS area.

V. Findings of Fact

A. Parties

1. ASAP Paging, Inc. (ASAP) is a commercial mobile radio service (CMRS) provider that is licensed by the U.S. Federal Communications Commission (FCC) to provide wireless

¹⁸ Tr. at 25-37.

paging services in several areas in Texas. ASAP does not hold any certification or registration with the Public Utility Commission of Texas (Commission).

2. CenturyTel of San Marcos, Inc. (CenturyTel) is an incumbent local exchange carrier (ILEC) that provides local exchange service within the San Marcos, Texas, exchange.

B. Procedural History

3. On April 2, 2002, ASAP and San Marcos Internet, Inc. filed a complaint against CenturyTel and a request for expedited ruling concerning CenturyTel charging long-distance toll to CenturyTel customers for calls to ASAP's customers. ASAP contends that such calls should be rated as local under Extended Local Calling Service (ELCS).
4. On April 5, 2002, ASAP and San Marcos Internet filed an amended complaint to correct factual errors and to remove San Marcos Internet as a party.
5. On April 9, 2002, the Commission's Policy Development Division referred the case to the State Office of Administrative Hearings (SOAH) for a contested case hearing and a proposal for decision, if necessary.
6. On April 15, 2002, SOAH Administrative Law Judge (ALJ) Thomas H. Walston held a preliminary hearing to consider a request by ASAP for interim ruling and emergency action.
7. On April 18, 2002, ALJ Walston entered Order No. 3, granting ASAP's request for interim ruling and emergency action and requiring CenturyTel not to require 1+ or 0+ dialing or to assess toll charges for calls made from CenturyTel's San Marcos exchange to ASAP's 512-384 NXX.
8. On May 9, 2002, the Commission issued its Preliminary Order outlining the issues to be addressed.
9. October 10-11, 2002, and November 12-13, 2002, ALJ Walston held a hearing on the merits.
10. On January 21, 2003, ASAP, CenturyTel, and Staff filed their initial post-hearing briefs.

11. On February 18, 2003, the parties filed their reply briefs and the record closed.
- 11A. SOAH returned the PFD to the Commission on April 24, 2003. The Commission issued a briefing order on June 11, 2002. ASAP, CenturyTel and Commission Staff filed briefs on June 19, 2003. ASAP and CenturyTel filed reply briefs on June 26, 2003, and Commission Staff filed its reply brief on June 27, 2003 after requesting permission for late filing.

C. ASAP's Paging Business

12. ASAP has a paging switch and terminal located in Austin, Texas. The switch is physically interconnected, through a Type 2A interconnection arrangement, to Southwestern Bell Telephone Company's (SWBT) Greenwood tandem switch in Austin, Texas.
13. ASAP provides one-way telecommunications services to its customers. ASAP does not provide its customers with flat rate residential and business local exchange telephone service, primary directory listings, tone dialing service access to operator services, access to directory assistance services, access to 911 service, the ability to report service problems seven days a week, lifeline or tel-assistance services. Also, ASAP does not provide a service that connects customer premises within a single exchange, and it does not provide its customers access to interexchange carriers.
14. ASAP has not expressly "designated a calling path" in this case. Instead, it has only designated a single point of interconnection (POI) within the LATA (Local Access Transport Area), and the ILECs can route to this POI as they choose
15. ASAP has a single POI in the Austin LATA, at SWBT's Greenwood tandem switch in Austin, Texas.
16. When a paging call is received at ASAP's Austin switch, the switch sends the call to ASAP's paging terminal that is co-located with the switch in Austin. ASAP's paging terminal may send a signal via the Internet to a satellite service in Chicago, Illinois,

which in turn sends a wireless signal to ASAP's paging transmitters, and to paging transmitters nationwide if the paging customer selects such a coverage plan. All of the paging transmitters broadcast (transmit) simultaneously when a paging call is received, and a broadcasted page can be received by a paging customer anywhere within the range of any of the transmitters.

17. ASAP owns paging terminals in the following locations: Austin, Smithville, Giddings, Bastrop, San Marcos, La Grange, Wimberley, Lockhart, Columbus, Hallettsville, Saturn, Sealy, Navasota, Bryan, Brenham, Georgetown, Buda, Rockdale, and Milano. An ASAP paging customer can receive a page if he/she is within the range of any of these transmitters regardless of the telephone number used to route the paging call. For example, a paging customer traveling in Bryan, Texas, but having a Kyle central office code (NXX) telephone number, may receive a page dialed to his Kyle number transmitted to him from the paging transmitter in Bryan.
18. ASAP has a paging transmitter in Lockhart but has no transmitter in the Kyle or Fentress exchanges. There is no landline connection between San Marcos and ASAP's Lockhart transmitter. Instead, all broadcasted pages are directed to this transmitter from a satellite to a satellite dish located at the transmitter.
19. DELETED.
20. Because all of ASAP's paging transmitters broadcast simultaneously, and because the wireless paging communication is one-way to the pager, it is not possible to determine the geographical location where a wireless paging call is received by an ASAP paging customer.
- 20A. When a telephone call is placed to ASAP for purposes of sending a page, ASAP is the "called party" from the calling party's perspective and for retail rating the call to the calling party.
21. In addition to the NXXs at issue in this case, ASAP has had in place for a number of years a wide-area calling arrangement with SWBT and CenturyTel that uses a 512/222 NXX. ASAP's 512/222 numbers are used exclusively for paging traffic; no ASAP ISP customers use these numbers. At the time of hearing, a majority of ASAP's paging

customers used the 512/222 NXX. This reverse toll billing arrangement allows calls from San Marcos to ASAP's terminal in Austin to be made without the assessment of a toll charge to the caller.

D. ASAP's Service to Internet Service Providers

22. In addition to paging service, ASAP provides telephone numbers and in-bound calling service to select Internet Service Providers (ISPs) on a private, contractual basis.
23. The service provided by ASAP to its ISP customers connects the ISPs to the public switched telephone network (PSTN) in order to receive modem calls from their customers seeking access to the Internet. ASAP's service to ISP customers does not allow the ISPs to place outbound telephone calls or to connect to inter-exchange carriers (IXCs).
24. ASAP's service to its ISP customers conveys, transmits, or receives communications wholly or partly over a telephone system.
25. The service provided by ASAP to ISPs is individually negotiated. This service is provided to the public.
26. When a call to an ASAP ISP customer comes into the SWBT's Greenwood tandem, the call is sent to ASAP's switch over landline interconnection trunks between SWBT and ASAP. When ASAP's switch receives the call, it routes the call over wireline connections to the ISP customer, who is either co-located at ASAP's Austin switch premises or has transport facilities at ASAP's Austin location to carry the traffic to its own facilities
27. DELETED.
28. Telecommunications received by ASAP's ISP customers over ASAP's facilities are placed by the ISPs onto the Internet and generally continue to webpages and websites located in other states or countries.

29. Calls to ASAP's ISP customers are not routed through and do not use any federally licensed CMRS wireless spectrum or mobile station.
30. The service ASAP provides to its ISP customers is not provided to ASAP's paging customers, and it is not directly related or supplemental to ASAP's CMRS paging service.
31. ASAP's contract with the ISPs requires all traffic to terminate at the ISP's location at the ASAP Austin switch and prohibits such traffic from terminating elsewhere on the PSTN.
32. When a telephone call is placed to an ISP for purposes of accessing the Internet, the ISP is the "called party" from the calling party's perspective and for retail rating the call to the calling party.

E. ASAP's NXXs

33. The three numbering plan area (NPA) NXX codes at issue in this proceeding are codes that ASAP obtained as a licensed CMRS paging carrier. ASAP has designated the NPA/NXXs in the Local Exchange Routing Guide (LERG) as assigned to exchanges having ELCS with the San Marcos exchange: 512/265 (registered in the LERG as rate centered on the Fentress exchange); 512/384 (registered in the LERG as rate centered on the Lockhart exchange); and 512/580 (registered in the LERG as rate centered on the Kyle exchange).
34. CenturyTel is the ILEC for the San Marcos exchange, SWBT is the ILEC for the Lockhart exchange, and Verizon Southwest is the ILEC for the Kyle and Fentress exchanges.
35. ASAP assigns telephone numbers to its paging and ISP customers without regard to whether the customer is physically located within the exchange to which the NXX is associated.
36. ASAP's switch and paging terminal are not located in an exchange that is ELCS to CenturyTel's San Marcos exchange.

37. ASAP does not use these NXXs to route an incoming page to a specific transmitter located in the exchange to which the number is nominally assigned. Rather, all transmitters broadcast simultaneously throughout ASAP's territory, or even nationwide, depending on the paging plan selected by the ASAP customer.
38. There is no geographical correlation between the exchanges with which ASAP has associated its NXXs and the location where a paging customer using an ASAP-supplied telephone number receives a paging call.
39. ASAP has requested that calls to these NXXs be routed from customers in the CenturyTel San Marcos exchange to ASAP's switch located in Austin but be rated as if they were ELCS calls to the Kyle, Lockhart, and Fentress exchanges.
40. At the time of the hearing, ASAP had no paging customers assigned to either its Kyle or Fentress NXXs. Only ASAP's ISP customers have been assigned those NXXs.
41. Based on minutes of use, the overwhelming majority of calls to the ASAP's NXXs at issue are calls to ASAP's ISP customers in Austin, not to ASAP's paging customers.
42. From October 2001 until April 1, 2002, CenturyTel delivered calls toll-free to the ASAP NXXs in dispute. Beginning April 2, 2002, CenturyTel changed its switch translations so that callers from San Marcos had to dial 1+ or 0+ to call ASAP's NXXs, and CenturyTel began charging its customers toll for such calls. The ALJ entered an interim order on April 18, 2002, requiring CenturyTel to cease requiring 1+ or 0+ dialing to call these NXXs and to cease charging toll for such calls, pending a final ruling in this case.

F. Extended Local Calling Service (ELCS)

43. Petition of Lockhart Exchange for Expanded Local Calling Service to the San Marcos, Luling, Martindale, Lytton Springs, Dale, Kyle, and Buda Exchanges, pursuant to SUBST. R. 23.49(c), Order No. 8 (Mar. 9, 1995) establishes ELCS between the San Marcos exchange and the Kyle, Fentress, and Lockhart exchanges. Under this order, a call from CenturyTel customers in the San Marcos exchange to parties in the Kyle, Lockhart, or

- Fentress exchanges are retail rated as a local call to the calling party. CenturyTel has made the interconnections and provides all services required by that order.
44. Under CenturyTel's tariffs, calls between the San Marcos exchange and the Lockhart, Kyle, and Fentress exchanges are rated as ELCS local. Under CenturyTel's tariffs, calls from CenturyTel's customers who have selected CenturyTel as their intraLATA provider between the San Marcos exchange and Austin are not ELCS, but are rated to the calling party as intraLATA long distance.
 45. ELCS service between San Marcos and the Kyle, Fentress, and Lockhart exchanges is provided by means of direct end-office-to-end-office trunks between these exchanges. These ELCS trunks are owned and maintained by CenturyTel, Verizon, and SWBT, who are the Local Exchange Carriers (LECs) who jointly provide the ELCS service between their respective exchanges.
 46. If calls from the San Marcos exchange to ASAP's NXXs were routed as other ELCS calls over the direct trunks to the Kyle, Fentress, and Lockhart exchanges, they would not complete because ASAP has no point of interconnection within any of these ELCS exchanges to receive calls to these NXXs.
 47. SWBT objects to using the current ELCS trunk between San Marcos and Lockhart for calls from CenturyTel's San Marcos customers to ASAP customers using a number from ASAP's Lockhart NXX.
 48. When a CenturyTel customer located in San Marcos dials an NXX that ASAP has associated with Kyle, Lockhart, or Fentress, the only means for this number to reach ASAP's Austin switch is via a trunk between CenturyTel's San Marcos tandem switch and SWBT's Austin Greenwood tandem switch. CenturyTel and SWBT have designated this trunk as a "toll trunk."
 49. SWBT and CenturyTel have established a "meet point" at the SWBT-owned "hut" on Wonder World Drive in San Marcos.
 50. CenturyTel is not being charged for use of the trunk between CenturyTel's San Marcos tandem switch and SWBT's Austin Greenwood tandem switch.

51. All calls from the San Marcos exchange to the NXXs at issue are transported over intraLATA trunks to ASAP's paging terminal in Austin. These calls must be transported to ASAP's switch in Austin as ASAP has no physical facilities in either the Kyle, Fentress, or Lockhart exchanges to receive these calls.
- 51A. CenturyTel's actions with respect to rating calls from CenturyTel's customers in San Marcos to ASAP's NXXs at issue are not anticompetitive in violation of PURA § 52.108(3).

VI. Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to the Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-64.158 (Vernon 1998 & Supp. 2003) (PURA) §§ 14.001, 52.003, and 53.001.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the conduct of this proceeding and to issue a proposal for decision, if necessary, pursuant to TEX. GOV'T CODE ANN. § 2003.049 (Vernon 2002).
3. The U.S. Federal Communications Commission (FCC) has exclusive jurisdiction to regulate ASAP's Commercial Mobile Radio Service (CMRS).
4. ASAP's service to its paging customers is a CMRS service regulated by the FCC.
5. A service can be "incidental" to CMRS without using a mobile unit or the wireless spectrum.
6. ASAP's service to its ISP customers is not a CMRS service and is not "incidental" to ASAP's CMRS authority.
7. DELETED.
8. DELETED.
9. DELETED.

10. ASAP's service to its ISP customers is not "basic local telecommunications service" as defined in PURA § 51.002(1).
11. ASAP's service ISPs is not "local exchange telephone service" as defined in PURA § 51.002(5).
12. ASAP's service to its ISP customers is not "switched access service" as used in PURA § 54.001.
13. ASAP is not in violation of the certification requirements contained in PURA § 54.001.
- 13A. Service provided by a nondominant carrier is service to the public.
14. ASAP's non-CMRS service to ISP providers includes conveying a communication partly over a telephone system, which qualifies ASAP as a "telecommunications utility" under PURA § 51.002(11) and a nondominant carrier under P.U.C. SUBST. R. 26.5(140).
15. As a telecommunications utility and nondominant carrier, ASAP is required to register with the Commission under PURA § 52.103 and P.U.C. SUBST. R. 26.107 for the services it provides to ISPs.
16. ASAP's FCC CMRS license does not exempt ASAP from registering with the Commission for ASAP's non-CMRS services to its ISP customers.
17. DELETED.
18. ELCS is created by PURA Chapter 55, Subchapter C. In order to be eligible for ELCS, the "petitioning central switching office must be located within 22 miles, using vertical and horizontal geographic coordinates, of the central switching office of the exchange requested for expanded local calling service" or the petitioning exchange must show that it shares a community of interest with the petitioned exchange.
19. The location of the calling customer and called customer should be used for purposes of retail rating ELCS calls.
20. DELETED.